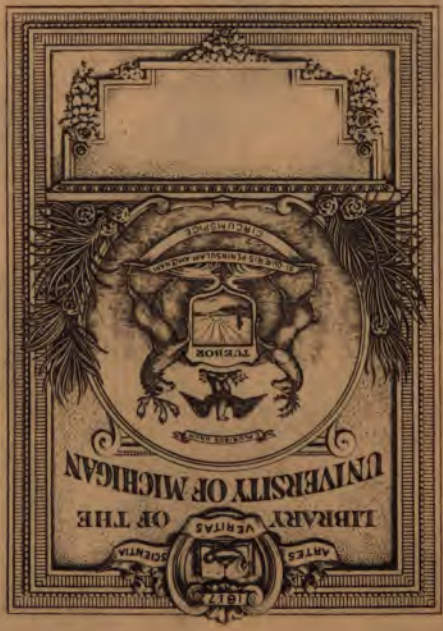

The League of Nations
and the
Coming Rule of Law

BY

SIR FREDERICK POLLOCK

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THE LEAGUE OF NATIONS AND THE COMING RULE OF LAW

THE movement in favour of a League of Nations, or, in the franker American wording, a League to enforce Peace, has now gone so far that there is no need to argue for taking it seriously. Like the reforms of the Liquor Control Board and all other rational reforms, it has enemies or treacherous friends in the camps of opposite extremes. A handful of chauvinists, whose only war aim seems to be to make plunder of the battered and discredited shining armour of Prussianism for their own wear, denounce it with their shrillest screams as a pacifist fad. A handful of pacifists and semi-pacifists offer their insipid lip-service with the purpose of taking out all the backbone and converting a drastic remedy into a futile anodyne. But a cause that has commanded the public support of such men of action as President Wilson, ex-President Taft, and General Smuts, such practical scholars and publicists as President Lowell of Harvard and Lord Bryce, and such a profound and impartial jurist, in the best sense of that often abused word, as Lord Parker, can afford to neglect both extremes.

Our problem is to lay down constructive lines for the working institutions with which the general idea must be clothed in order to become a power capable of establishing a restored, amplified, and effectual law of nations on a sure footing. The old methods of custom and voluntary convention sanctioned by undefined general opinion have broken down: the new law demands a seat of justice and judgement: the new justice demands organs of counsel to frame its decrees, and instruments of execution that shall be strong, and at need swift, to maintain them.

Let it be premised that the foundation of a league for peace is already laid in the alliance of a score of free nations against William of Germany whose god is the Prussian State, Charles of Austria whose god is his dynasty, the Magyar oligarchy whose god is racial supremacy, and the satellite kingdoms and subdued provinces bound to them for just as long as their tyranny seems to prosper. The strength of that tyranny must be broken as the first condition of making such a peace as will deserve to be secured by better and more lasting covenants than the usual treaties. There must be no betrayal of oppressed nationalities in the east as the price of restitution in the west; restitution which is a matter, not of bargain, but of plain right.

All this must be settled before we can talk of receiving the Central Powers as partners or fellow-workers. Not that their willingness to join a league

of nations, unless Germany is to be the head of it (for that is what their official utterances indicate), is to be counted on. The only kind of partnership we ask for or can accept is one in which no single Power may be dominant. In the least favourable event a reinforced and regularly organized league, based on the present military union of the Western Powers and excluding the Central Powers, would in all ways be a great step in advance, and far more effectual for restraining future aggression than unorganized alliance or understandings. Doubtless the ideal is a League embracing a morally transformed Germany and a group of East European States differing in both moral and material aspects from the moribund Austro-Hungarian Empire. But meanwhile the League need not command the military power of the whole world. Enough for our day if it wields so much warlike strength, and so well organized, as to make defiance of it manifestly unpromising. Thus much for the preliminary conditions. If any one thinks they can be dispensed with or circumvented, I must respectfully differ.

How, then, shall the League of Nations be organized? Obviously by solemn express convention, a convention whose binding force must depend on the renouncement by every party to it, in some measure, of independent sovereign power, and in particular of the right to be judge in one's own cause. For the plan of merely persuasive authority, which any party may obey or

disregard at his own discretion, has been tried and found wanting.

Renouncement of sovereignty is still a sticking point with many publicists: see M. Seignobos in 'The New Europe' of April 4. They forget that some renunciation of individual right and discretion is the foundation of every agreement, public and private, that is to govern future action. All binding promises, great or small, restrain the promisor's freedom. That, indeed, is the essence of promise. No member of the Postal Union, which includes almost all civilized governments, is sovereign in the matter of foreign postal rates. The question for every contracting party in all forms of contract is whether the portion of liberty he surrenders is adequately recompensed by the portion of reward or security he acquires. Rights cannot be made out of nothing any more than mechanical work; as surely as there is no action without reaction in physics, you cannot create rights in politics without imposing duties and limiting freedom of action somewhere. But the right and liberty of self-defence, it is said, are indefeasible. Quite true in the last resort, and as much so for one man as for a society. Nevertheless all civilized laws keep self-defence within pretty strict bounds, English law rather specially so.

The first business of a League of Nations is to secure its members against military aggression. Every member must pledge itself not to take the law (or

what it deems to be the law) into its own hands against any other, and to aid the others, at need, in case of attack from without. The next duty is to provide regular and equitable means of settling disputes. Surrender of the liberty to assert one's claims by force can only be in exchange for reasonable assurance of judgement and justice. Then, the law of nations itself being at many points uncertain (a defect common to all bodies of customary rules), there must follow provision for defining and amending it. To carry out these purposes the League will need some common representative body having authority to supervise the working of the special organs and to see that their decisions are respected. Whether this body should be armed with power to issue direct executive commands is a question open to discussion for the present. I think myself that such power will come later if it is not granted at first.

The latest and fullest endeavour in this country to state the lines of a working scheme was made by Lord Parker in the debate on Lord Parmoor's motion on March 19, 1918, a debate which, at the time of this writing, still stands adjourned. Lord Parker's heads for the agreement that shall constitute the League are twenty in number, and have been carefully thought out. (It is useless to consult the press reports for them; they are set out only in the official Parliamentary Debates.) Space does not admit of copying them here, or following their exact order, but I shall

keep them in view. They deal very little with internal regulation; they are a first draft of the memorandum rather than of the articles, if one may borrow the language of company law.

First in place and importance comes acknowledgement—meaning formal and recorded acknowledgement—of the principle of settling disputes by peaceable means as binding on all civilized nations. As to the means, Lord Parker takes a rather peculiar line; he would postpone the question of a standing judicial court as involving excessive difficulties in settling the representation of different nations, constituting the tribunal so as to exclude any risk of partiality, and the like, neither does he propose to compel reference to the existing tribunal of The Hague. Apparently Lord Parker would have the League say to its members: 'It may be a long time before we can agree on the frame of a permanent court of justice among nations. For the present you may refer disputes to The Hague, or to any agreed arbitrator you please, or you may provide a standing machinery by special treaties between any two or more of you; but in one way or another you must all bind yourselves to seek a peaceable settlement, and seek it in good faith. That is the fundamental condition of membership.'

I do not see why Lord Parker's way should not be a very good way, and I think it would work out to the general adoption of not more than one or two

types of comprehensive arbitration treaties which in time, perhaps no long time, could be consolidated into one general ordinance or convention. The difficulties of creating a true judicial court, however, do not seem to me quite so formidable as they do to Lord Parker. For we must remember that the statesmen who come together to found the League of Nations will mean business from the first. Their meeting will be a wholly different affair from the Hague Conference, where the chief aim of one Great Power was to have as little done as was decently possible, and that of some lesser ones to magnify their own importance at all costs. When difficulties are faced by capable men not divided on any fundamental principle, and determined to reach a working agreement, they have already lost half their terrors. It is needless to say to any one acquainted with the work of the Peace Conferences of 1899 and 1907, but the warning may be useful to others, that their constitution and procedure are wholly inapplicable to the construction of a League of Nations.

As Lord Parker relegates the formation of a standing tribunal to the background, he does not notice the distinction between a court for 'justiciable' and a council or board of conciliation for 'non-justiciable' disputes; Mr. Taft made this prominent three years ago, and almost every writer who has handled the matter seriously recognizes its importance. But a general council of direction is part of Lord Parker's

plan, and it is easily seen that its functions would in fact be quasi-judicial, and that it would have to specialize its work by some committee system for this and other purposes. It should be noted that even those schemes which include a formal judicature have not proposed to give it any immediate power of enforcing its awards. So Lord Parker's method is less remote from others than may appear at first sight.

The League, however organized, would guarantee its members against acts of war committed against them by non-members. It would define what should be considered as acts of war. A nation refusing or neglecting to take steps for peaceable settlement of a dispute would be denounced by special resolution of the Council, and, if a member, would forfeit its membership. On an act of war being notified by the Council, the members of the League would be bound to break off diplomatic relations and commercial intercourse with the offending nation. If this does not suffice, military execution is to be undertaken on the Council's requisition by specified members of the League, consisting of the chief military and naval Powers. (Lord Parker seems rather to glide over the military problems involved here. Can the necessary joint action be effectually and promptly taken without preconcerted measures amounting to the establishment of a common General Staff? I doubt it. But that may stand over along with the question of a judicial

tribunal. Acceptance of the principle is what matters first.)

Thus Lord Parker's Council would be a body wielding no small authority. His plan for its constitution is novel and ingenious. 'Each member of the League should nominate one member of the Council. But for a special resolution'—that is, a resolution committing the League to measures of economic or military coercion—'there should be required, not only a majority of the members present and voting, but a majority of the councillors representing those members of the League mentioned in the schedule'—the executive Great Powers—'upon whom will fall the burden of any warlike proceedings.' This avoids by one bold stroke many troublesome questions of representation and contribution, and it may well be that no more exact provision would ever be needful. For, if the League be once fairly set up as a working body, it does not seem likely that dissension within or aggression from without will come to the point of calling for actual coercion.

Some new divergence of interests capable of breaking up the League is, no doubt, conceivable. Alliances are not eternal and constitutions are not infallible, but, if well made, they may do, as even with all former imperfections they have done, good service for a long time. Again, it is certain that, in the event of the German Empire remaining outside, the methods which recent disclosures have made familiar would be

employed to tempt members of the League into combinations inconsistent with its objects (but Lord Parker has not forgotten to provide against secret agreements) or otherwise to undermine their mutual confidence. As to this it is only to be observed that the same arts would no less surely be employed against an unorganized alliance, and with a better prospect of success. Even if reduced to a secondary degree of military power, Germany under continuing militarist rule would remain capable of giving trouble in this way. No better counter-check, indeed no other, than a well-knit league of the law-abiding nations has been suggested.

Lord Parker will have nothing to do with the most unwise proposal of the English League of Nations Society, 'that any civilized State desiring to join the League shall be admitted to membership'. (The objectionable clause is modified in that society's own comment by a half-hearted intimation that the League would have to judge in every case whether the candidate was civilized; but that is not the right word. Modern Germany is civilized and in some respects over-civilized; our case is that the Prussian type of civilization is a thoroughly bad type and not fit for decent company.) According to Lord Parker, on the contrary, a new member will be admitted only by special resolution of the Council, who must be satisfied that the candidate accepts the fundamental principles, and intends to act on them, in good faith. That is a frank declaration of

the only safe way. But this does not mean that the League would always be a kind of select club: 'no nation could be permanently excluded from membership, and in course of time we would hope that every nation would join.'

Also there is nothing about disarmament in Lord Parker's plan. Evidently he thinks it cannot be imposed at first, but must be left to follow the establishment of general confidence; just as in European society wearing swords went out of fashion when the improvement of justice and police had abolished the fear of highway robbers and suppressed private fighting as distinguished from formal duelling. That, indeed, survived much longer and yet lingers in some countries, but duelling is at any rate better than unruly brawling and chance medley. I am wholly of Lord Parker's mind on this point.

It is thought in some quarters, I am told, that states of less than the first magnitude might be shy of joining a league of peace, fearing that if they gave up any portion of absolute sovereignty they would lose their independence and sink to being mere protectorates under the Great Powers. This apprehension does not seem well founded. A Power such as Denmark or the Netherlands would have everything to gain by joining. It would be in a far stronger position to resist external pressure than ever before, having its independence and freedom from warlike aggression guaranteed by the whole force of

the League. It would have for the first time a definite right to a voice in all common counsel, not only in special conventions. An equal vote in all matters is not to be expected; no company that I ever heard of gives the same voting power to the holder of a hundred shares as to the holder of a thousand.

Indeed there must be some provision, by Lord Parker's method or otherwise, against the Great Powers or a majority of them being bound on paper by a combination of minor Powers to some burdensome course which they disapprove. Certain paper majorities at the Hague Conferences may serve to point the warning. As for the contrary danger of the Greater Powers combining to partition the lesser ones, as it were, into spheres of influence, the answer is that such a plot could be hatched only by secret agreement, and secret agreements would be expressly forbidden by the constitution of the League. But no materially sufficient number of Great Powers, were they ever so evilly disposed, would in fact agree. The present attempts of Germany, Austria, and Hungary to compromise on their iniquitous ambitions with regard to Poland alone are instructive in this respect.

There remains a great object of the League which Lord Parker has left aside, regarding it apparently as a matter for later development which need not be expressly dealt with in the constituent convention: the restoration and better definition of the law of nations. Here Mr. Taft's proposal holds the field.

The Council of the League or a specially reinforced committee thereof would proceed, in a course of regular conferences, to frame conclusions in the nature of provisional orders; these would be laid before the governments of the constituent Powers and become binding if no dissent were expressed within a stated time. A lengthy process, it will be said, and subject to delays and possible set-backs. It would be so, and so it ought to be. Even within one jurisdiction a good code is not made in a year or two. Given the framework of secured peace within which the work could be done with fitting deliberation, five years would be no excessive time to allow for the first production of definite results, or ten years for completion.

Success in accomplishing all or any of the ends for which the League of Peace will be founded assumes initial good faith, continuing good will, and perseverance in carrying the business through. That is no objection at all. For the work will not even be begun unless the delegates of the free nations meet with such high and serious purpose as to make sure that these conditions are satisfied. With faith, courage, and patience it can and will be done.